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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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WESTERN DUPLICATING, INC.,

Plaintiff,

NO. CIV. S 98-208 FCD GGH

v.

MEMORANDUM AND ORDER

RISO KAGAKU CORPORATION et
al.,

Defendant.

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This antitrust action is before the court on defendant Riso, Inc.'s ("Riso") motion to dismiss, or alternatively, for summary judgment,¹ and plaintiff Western Duplicating, Inc.'s ("Western") cross-motion for partial summary judgment.

TIMING OF RISO'S MOTION FOR SUMMARY JUDGMENT

As a preliminary matter, Western contends that Riso's motion for summary judgment is premature since Riso has "stonewalled" discovery. According to Western, (1) Riso supports its motion for summary judgment with documents Western requested, and Riso

¹ Defendant RPSI Enterprises dba Riso Products of Sacramento ("RPSI") joins in Riso's motion.

345

1 refused to produce, and (2) on the date Western filed its
 2 opposition, Riso had produced very few documents. As a result,
 3 Western contends that its ability to respond to Riso's motion is
 4 greatly impaired.

5 Generally, summary judgment is not appropriate when the
 6 nonmoving party has not had an adequate opportunity to conduct
 7 any discovery. "Rule 56(f) motions should be granted 'almost as
 8 a matter of course' unless 'the nonmoving party has not
 9 diligently pursued discovery of evidence.'" Wichita Falls Office
 10 Assocs. v. Banc One Corp., 978 F.2d 915, 919 n. 4 (5th Cir. 1992)
 11 (quoting International Shortstop, Inc. v. Rally's, Inc., 939 F.2d
 12 1257, 1267 (5th Cir. 1991)). "Summary judgment is especially
 13 inappropriate where the material sought is also the subject of
 14 outstanding discovery requests." Visa Int'l Serv. Ass'n v.
 15 Bankcard Holders of Am., 784 F.2d 1472, 1475 (9th Cir. 1986).

16 The court has reviewed the file and notes that Western has
 17 been diligent in its pursuit of discovery. Only limited
 18 discovery was permitted prior to November 2, 1999. Riso filed
 19 the instant motion just two months later on January 14, 2000.
 20 Since that time, Western and Riso have continued to do battle
 21 over the production of documents. In October 2000, however, Riso
 22 produced 85 boxes of documents in response to Western's numerous
 23 requests. According to the magistrate judge's October 31, 2000
 24 order on Western's motion regarding production of records and
 25 other topics, that production was just the beginning.'

26
 27 ² The court does not accept Western's accusation that
 28 Riso "stonewalled" discovery. According to the magistrate
 judge's order, Western propounded some 400 separate requests for
 production. Order, filed Oct. 31, 2000, at 4.

1 Given the present state of discovery, and the need to
 2 proceed with caution in summarily adjudicating a complex
 3 antitrust action such as this, the court finds Riso's motion for
 4 summary judgment premature, and denies the same without
 5 prejudice. The court likewise denies Western's motion for
 6 partial summary judgment without prejudice.' The parties' may
 7 re-file their respective motions after the close of discovery.

8 BACKGROUND

9 The facts set forth herein are drawn from Western's Second
 10 Amended Complaint ("SAC"). Riso Kagaku Corporation ("RKC") is
 11 one of three manufacturers of digital duplicators in the world.
 12 SAC ¶ 15.⁴ Its digital duplicators are known as "Risographs."
 13 RKC also manufactures parts and supplies, including ink and
 14 masters, for use in Risographs, and markets these products in the
 15 United States through its wholly-owned subsidiary Riso. Id. ¶ 1.
 16 Riso, in turn, markets the machines, parts, and supplies to end-
 17 users primarily through a network of 240 authorized Riso dealers,
 18 including defendant RPSI. Id. ¶¶ 7, 8. Riso also sells a
 19 relatively small amount of product directly to end-users through
 20 18 branch offices. In addition to marketing Riso products, Riso
 21 dealers also provide service, warranty and repair services to
 22 Risograph owners. Riso and its dealers enjoy a 65-75% share of
 23 the digital duplicator market in the United States, and a 90%
 24 share of the aftermarket for Risograph supplies. Id. ¶¶ 24, 30,

25
 26 ³ The parties' respective objections to evidence are also
 27 denied without prejudice.

28 ⁴ RKC was dismissed as a defendant in this action for
 Lack of personal jurisdiction on July 23, 1999.

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Western sells ink and masters for use in digital duplicators, including Risographs. Id. ¶ 11. Western sells ink and masters directly to owners of digital duplicators, as well as indirectly through distributors and dealers throughout the United States. Id. Western began competing with Riso and its dealers for sales of inks and masters sometime after January 30, 1994. Id.

According to Western, Riso and its dealers unlawfully conspired to exclude it from the aftermarket for ink and masters. Id. ¶¶ 13, 14. As detailed below, Western contends that Riso uses its market power in the digital duplicator market to prohibit its dealers from selling non-Riso supplies. Id. ¶ 40. Western further contends that Riso and its dealers leverage their market power in the maintenance, service and repair aftermarket to eliminate competition in the supplies aftermarket. id. ¶¶ 14, 28, 30.

Following the entry of high quality competitive inks and masters in late 1993 and 1994, Riso amended its dealer agreement in April 1994 to prohibit its dealers from offering competitive (non-Riso) inks and masters for use in Risographs, thereby conditioning its dealers' ability to purchase Risographs upon those dealers not offering competitive supplies. Id. ¶ 34. The amended dealer agreement ("dealer agreement") likewise prohibits terminated dealers from selling non-Riso products, thereby conditioning terminated dealers' ability to purchase spare parts necessary for service upon terminated dealers not offering competitive supplies. The dealer agreement further prohibits

1 also dealers from selling Riso products to anyone but end-users,
2 and provides that the warranty given to dealers does not cover
3 the cost of repairs or adjustments caused by parts, supplies,
4 repairs or maintenance services not authorized by Riso. Id.
5 Western contends that these restrictions threatened Riso dealers'
6 revenue streams because competitors could offer ink and masters
7 at prices significantly below Riso prices. According to Western,
8 these restrictions provided Riso dealers with an incentive to
9 restrain trade and restrict competition in the sale of ink and
10 masters.

11 Western argues that once Riso provided its dealers with the
12 incentive, beginning in October 1994 and lasting to the present,
13 Riso and its dealers combined and conspired to eliminate
14 competition from "supply pirates" such as Western. Id. ¶¶ 35,
15 52. Specifically, Western alleges that Riso dealers agreed to
16 use "service threats" to coerce customers to use Riso ink and
17 masters and to spread fear, uncertainty and doubt (known as "FUD
18 marketing") in the minds of consumers in order to discourage them
19 from purchasing competitive ink and masters. Id. ¶ 53. Among
20 other things, Western contends that Riso produced "warnings"
21 concerning the use of non-Riso supplies and distributed them to
22 its dealers to pass-on to end-users. Id. 86-89. These warnings
23 state that use of non-Riso supplies may, among other things, harm
24 the Risograph, and damage caused by the use of non-Riso supplies
25 is not covered under the warranty. Id. Western further alleges
26 that some Riso dealers, including RPSI, tell Risograph owners
27 that use of non-Rise supplies will void their warranties. Id. ¶¶
28 72-74.

1 Western contends that these efforts have been, and continue
2 to be, successful because Riso and its dealers have monopoly
3 power over the service, maintenance and repair of Risographs.
4 Id. ¶ 55. According to Western, this monopoly power exists
5 because Riso only sells spare parts to its dealers and terminated
6 dealers and prohibits them from selling the parts to anyone but
7 an end-users. Thus, because of these restrictions, there are no
8 independent service organizations for Risographs, and because
9 there are no service options for most customers, "service
10 threats" and FUD marketing succeed in eliminating competition for
11 sales of ink and masters for use in Risographs. Id. ¶ 55.

12 As a result of this conduct, Western alleges that it has
13 been excluded from selling competitive ink and masters for
14 Risographs.

15 ALLEGED VIOLATIONS

16 Based on the above policies and practices, Western alleges
17 the following antitrust violations against Riso and RPSI: (1)
18 monopolization, attempting monopolization, and conspiracy to
19 monopolize the aftermarket for sales of ink and masters in
20 violation of § 2 of the Sherman Act; (2) illegal tying of
21 Risographs to dealer's agreement not to sell competitive ink and
22 masters in violation of §§ 1 and 3 of the Sherman Act; (3)
23 illegal tying of spare parts and service manuals to terminated
24 dealer's agreement not to sell competitive ink and masters in
25 violation of §§ 1 and 3; and (4) illegal group boycott in
26 violation of § 1.

27 In addition to violating antitrust laws, Western contends
28 that Riso and RPSI made misleading and false representations

1 concerning non-Riso products in violation of the Lanham Act, the
 2 California Cartwright Act, Cal. Bus. & Prof. Code § 16600, and
 3 the California Unfair Business Practices Act, Cal. Bus. & Prof.
 4 Code § 17200, and intentionally interfered with Western's
 5 contractual relations and prospective economic advantage.
 6 Finally, Western contends that Riso violated Massachusetts
 7 Protection Act, Mass. Gen. Laws ch. 93A.

8 STANDARD

9 A complaint will not be dismissed under Fed. R. Civ. P.
 10 12(b)(6) "unless it appears beyond doubt that plaintiff can prove
 11 no set of facts in support of his [or her] claim that would
 12 entitle him [or her] to relief." Yamaguchi v. Department of the
 13 Air Force, 109 F.3d 1475, 1480 (9th Cir. 1997) (quoting Lewis v.
 14 Tel. Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996)).
 15 "All allegations of material fact are taken as true and construed
 16 in the light most favorable to the nonmoving party." Cahill v.
 17 Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

18 ANALYSIS

19 1. Market Power In Western's Proposed Product Markets

20 In order to prevail on its conspiracy, monopolization,
 21 attempted monopolization claims, and tying claims, Western must
 22 show, among other things, that Riso possesses market power in the
 23 relevant product markets. Rebel Oil Co., Inc. v. Atlantic
 24 Richfield Co., 51 F.3d 1421, 1444 (9th Cir. 1995) (market power
 25 required for conspiracy to restrain trade); Eastman Kodak Co. v.
 26 Image Technical Servs., Inc., 504 U.S. 451, 481 (1992)
 27 (hereinafter "Kodak I") (quoting United States v. Grinnell Corp.,
 28 384 U.S. 563, 570-71 (1966) (market power required for

1 monopolization); Image Technical Servs., Inc. v. Eastman Kodak
 2 Co., 125 F.3d 1195, 1202 (9th Cir. 1997) (hereinafter "Kodak II"),
 3 (market power required for attempted monopolization); Dataqate,
 4 Inv. v. Hewlett-Packard Co., 60 F.3d 1421, 1423-24 (9th Cir.
 5 1995) (market power in tying product required for tying claim⁵).

6 Monopoly power, commonly referred to as market power, is
 7 "the power to control prices or exclude competition." Grinnell
 8 Corp., 384 U.S. at 571 (quoting United States v. E.I. du Pont de
 9 Nemours & Co., 351 U.S. 377, 391 (1956)). A plaintiff may
 10 demonstrate market power either directly or circumstantially.
 11 Direct evidence is "evidence of restricted output and
 12 supracompetitive prices." Rebel Oil, 51 F.3d at 1434. "To
 13 demonstrate monopoly power by circumstantial evidence, 'a
 14 plaintiff must: (1) define the relevant market, (2) show that the
 15 defendant owns a dominant share of that market, and (3) show that
 16 there are significant barriers to entry and show that existing
 17 competitors lack the capacity to increase their output in the
 18 short run.'" Kodak II, 125 F.3d at 1202 (quoting Rebel Oil, 51
 19 F.3d at 1434).

20 Western claims that the relevant geographic market is the
 21 United States, and the relevant product markets are: (1) the
 22 market for high speed digital duplicators ("original equipment
 23 market"); (2) the market for warranty and maintenance service for
 24 Risographs ("warranty and service aftermarket"); and (3) the
 25 market for ink and masters ("supplies aftermarket"). SAC ¶ 14.

26
 27 ⁵ "A tying arrangement is a device used by a competitor
 28 with market power in one market (for the 'tying' product) to
 extend its market power into an entirely distinct market (for the
 'tied' product)." Id. at 1423.

1 Riso assumes, for purposes of its motion to dismiss only, that
2 Western's definitions of the relevant product markets and Riso's
3 share of the same, are correct.

4 **A. Market Power In The Digital Duplicator Market**

5 Riso contends that dismissal is proper because Western
6 admits in its SAC that at least nine competitors have entered the
7 "digital duplicator market." While Western does allege that
8 competitors entered the digital duplicator market after Riso, it
9 also alleges that, despite the increasing demand, the number of
10 competitors is decreasing, and there have been no new
11 manufacturers of digital duplicators *since 1990*. *Id.* ¶ 25. In
12 other words, no competitor has entered the market in the past
13 decade. Western's allegations do not preclude a finding of
14 market power in the digital duplicator market as a matter of law.

15 Riso further contends that dismissal is proper because
16 Western alleges that competitors have expanded. Riso bases its
17 contention on Western's allegations that (1) Ricoh and Duplo
18 entered the market after Riso, and (2) "[a]t present, only Ricoh
19 and its dealer networks exist as a substantial competitor to RISO
20 and its dealers in the original equipment market." *Id.* ¶ 26.
21 According to Riso, the only inference to be drawn from these
22 allegations is that Ricoh and Duplo have increased their market
23 share by expanding their output and sales.

24 As set forth above, Western alleges that Ricoh and Duplo
25 entered the market prior to 1990. Assuming, as Riso apparently
26 does, that their respective market shares were zero upon entry,
27 their output has expanded. However, the expansion of output at
28 some unknown point during the past decade does not defeat

Western's current claim of market power. Indeed, expansion may have contracted over the past several years. Accordingly, Western's allegations do not preclude a finding of market power in the digital duplicator market as a matter of law.

B. Market Power In The Aftermarket For Supplies

Riso contends that dismissal is proper because Western admits in its SAC that (1) competitors have entered the supplies aftermarket, and (2) existing competitors do not lack capacity to expand. The latest date on which a competitor is alleged to have entered the supplies aftermarket is "early 1994." *Id.* ¶¶ 32-33. Competitors entering the market before the alleged predatory conduct is said to have begun, does not establish the absence of entry barriers. See Rebel Oil, 51 F.3d at 1434.

Moreover, Riso's motion is directed solely at Western's circumstantial proof of market power in the aftermarket for supplies. However, Western has alleged direct proof of market power in this market. See Western alleges that Riso restricts output via its dealer agreement and that it charges supracompetitive prices for its ink and masters. SAC ¶¶ 34, 111. Thus, Western has adequately alleged market power in the supplies aftermarket.⁶

2. Contract, Combination or Conspiracy To Restrain Trade

Section 1 of the Sherman Act reads in relevant part:

⁶ Although it is not altogether clear, Riso also appears to contend that Western's claim that Riso monopolizes or attempts to monopolize the aftermarket for warranty and maintenance service is defeated by Western's allegations concerning entry barriers in the supplies aftermarket. As set forth above, Western's allegations do not defeat its claim that Riso has market power in the supplies aftermarket.

1 Every contract, combination in the form of trust or
 2 otherwise, or conspiracy, in restraint of trade or
 3 commerce among the several States, or with foreign
 4 nations, is hereby declared to be illegal. Every
 5 person who shall make any contract or engage in any
 6 combination or conspiracy hereby declared to be illegal
 7 shall be deemed guilty of a felony

8 15 U.S.C. § 1. To establish a claim under Section 1, Western
 9 must: (1) demonstrate the existence of a conspiracy; (2) that the
 10 conspiracy unreasonably restrained trade under either a per se
 11 rule of illegality or under a rule of reason analysis; and (3)
 12 that the restraint on trade affected interstate commerce. See
 13 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991).

14 The conspiracy element of Section 1 limits the "application
 15 of the Sherman Act to concerted conduct by more than one person
 16 or single entity." Oltz v. St. Peter's Cmty. Hosp., 861 F.2d
 17 1440, 1449 (9th Cir. 1988). To survive a motion to dismiss, a
 18 plaintiff must "allege the essential element of conspiracy"
 19 between two or more parties. See Smilecare Dental Group v. Delta
 20 Dental Plan of Cal., Inc., 88 F.3d 780, 786 (9th Cir. 1996).

21 Section 1 does not proscribe purely unilateral activity by a
 22 single entity. United States v. Colgate, 250 U.S. 300, 307
 23 (1919).

24 Riso moves to dismiss Western's claims brought pursuant to
 25 Section 1 on the ground that Western cannot rely on the
 26 restrictions contained in the Riso dealer agreement to support
 27 its conspiracy allegations because the dealer agreement was
 28 unilaterally amended by Riso to contain those claims.

"[A] contract between a buyer and a seller satisfies the
 concerted action element of section 1 of the Sherman Act where

1 the seller coerces a buyer's acquiescence in a tying arrangement
 2 imposed by the seller." Systemcare, Inc. v. Wang Laboratories
 3 Corp., 117 F.3d 1137, 1142 (10th Cir. 1997). As the court
 4 reasoned in Systemcare, "[t]he essence of section 1's contract,
 5 combination, or conspiracy requirement in the tying context is
 6 the agreement, however reluctant, of a buyer to purchase from a
 7 seller a tied product or service along with a tying product or
 8 service. To hold otherwise would be to read the words 'contract'
 9 and 'combination' out of section 1." Id. at 1142-43.' As the
 10 Supreme Court noted in Perma Life Mufflers, Inc. v. International
 11 Parts Corp.:

12 A plaintiff can clearly charge a combination between
 13 Midas and himself as of the day he unwillingly complied
 14 with the restrictive franchise agreements, or between
 15 Midas and other franchise dealers, whose acquiescence
 in Midas' firmly enforced restraints was induced by the
 communicated danger of termination.

16 392 U.S. 134, 142 (1968) (citations and quotation marks omitted),
 17 overruled on other grounds, Copperweld Corp. v. Independence Tube
 18 Corp., 467 U.S. 752 (1984); see also Will v. Comprehensive
 19 Accounting Corp., 776 F.2d 665, 669-70 (7th Cir. 1985).

20 Western alleges, among other things, that Riso violated
 21 Section 1 of the Sherman Act by illegally tying (1) the sale of
 22 Risographs to its dealer's agreement not to sell competitive ink
 23 and masters, and (2) the sale of spare parts and service manuals
 24 to its terminated dealer's agreement not to sell competitive ink
 25 and masters. SUF ¶¶ 40, 45. According to Western, Riso coerces

26 1 Tying arrangements also include agreements in which the
 27 seller agrees to sell one product only on the condition that the
 28 buyer agrees not to purchase that product from any other
 supplier. Imaae Technical Servs. v. Eastman Kodak Co., 903 F.2d
 612, 615 (9th Cir. 1990).

1 its dealers to acquiesce in the agreement under threat of losing
2 their dealerships and its terminated dealers under threat of
3 losing their access to spare parts, and thus, the substantial
4 revenues they derive from servicing their installed equipment
5 **base**. Id. ¶¶ 40, 45, 51. Western's allegations are sufficient
6 to allege a conspiracy under Section 1.

7 Moreover, Western does not limit its conspiracy allegations
8 to the restrictions contained in the dealer agreement. Western
9 also alleges that Riso and its dealers conspired at the October
10 1994 Dealer Advisory Council Meeting to eliminate competition
11 from "supply pirates" such as Western. Pursuant to that
12 conspiracy, Riso dealers **allegedly** agreed to use service threats
13 to coerce customers to use Riso inks and masters and to spread
14 fear, uncertainty and doubt in the minds of consumers to prevent
15 them from purchasing non-Riso inks and masters. Id. ¶¶ 31-36.
16 Western's allegations concerning the agreements entered into at
17 the Dealer Advisory Council Meeting are sufficient to allege the
18 existence of a conspiracy to restrain trade. Accordingly, Riso's
19 motion to dismiss Western's Section 1 claim is denied.

20 3. Restrictions In The Dealer Agreement

21 A. Exclusive Dealing Arrangements

22 Riso alternatively **moves** to dismiss Counts 1 and 3 on the
23 ground that the challenged restraints are not anticompetitive.
24 According to Riso, the challenged restraints are essentially
25 exclusive dealer arrangements. While it is true that exclusive
26 distribution agreements, standing alone, do not violate the
27 antitrust laws, see A.H. Cox & Co. v. Star Machinery Co., 653
28 F.2d 1302, 1306-07 (9th Cir. 1981), Western contends that the

1 challenged provisions are not merely exclusive dealing
2 agreements, but illegal ties.⁸ Western also contends that the
3 restrictions are part of a scheme to restrain trade in the
4 aftermarket for supplies, and thus, constitute illegal exclusive
5 dealing arrangements.

6 An exclusive dealing contract involves a commitment by a
7 buyer to deal only with a particular seller, and is unlawful only
8 if it violates the rule of reason. Morgan, Strand, Wheeler &
9 Biggs v. Radiology, Ltd., 924 F.2d 1484, 1488-90 (9th Cir. 1991).
10 "Only those arrangements whose 'probable' effect is to 'foreclose
11 competition in a substantial share of the line of commerce
12 affected' violate Section 3." Omega Envtl., Inc. v. Gilbarco,
13 Inc., 127 F.3d 1157, 1162 (9th Cir. 1997) (quoting Tampa Elec.
14 co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)). In
15 assessing market foreclosure, the court must consider whether
16 competitors can reach the ultimate consumers of the product by
17 employing existing or potential alternative channels of
18 distribution. Id. at 1163. If so, the arrangements may not
19 actually foreclose competition. Moreover, exclusive dealing
20 arrangements imposed on dealers rather than end users "are
21 generally less cause for anticompetitive concern." Id. at 1162-
22 63. Relying on Omega, Riso argues that dismissal of Counts 1 and
23 3 is proper because alternative channels of distribution exist
24 and the challenged restrictions apply only to distributors, not
25 end-users.

26
27 ⁸ Tying and exclusive dealing are two distinct claims.
28 See Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs., Inc., 637
F.2d 1376, 1388 (9th Cir. 1981).

1 Riso's argument fails to consider the additional alleged
2 restraints not present in Omeaa and their impact on Western's
3 ability to sell to ultimate consumers. Even assuming Western can
4 reach ultimate consumers (Risograph owners), Western alleges that
5 the vast majority refuse to purchase its supplies for fear of
6 damaging their Risographs or invalidating their warranties.
7 Western contends that their refusal is the result of Riso's and
8 its dealers conspiracy to restrain trade in the supplies
9 aftermarket through the use of service threats and FUD marketing.
10 Riso's argument also fails to consider Western's allegation that
11 "[b]ecause RISO dealers control the servicing of Risographs,
12 selling through Riso dealers is a competitive necessity." These
13 factors were present in in Omega.⁹ Accordingly, Riso's motion to
14 dismiss Counts 1 and 3 is denied.

15 **B. Non-Price Vertical Restraints**

16 Riso contends that the types of restraints contained in its
17 dealer agreement are routinely upheld because they have no
18 negative impact on competition. Riso asks the court to review
19 the challenged restrictions in a vacuum, and to ignore the
20 remaining allegations contained in the Western's second amended
21 complaint. As set forth above, Western contends that the
22 challenged restrictions motivate Riso dealers and terminated
23 dealers to engage in additional conduct aimed at eliminating
24 competition in the supplies aftermarket, including the use of
25 service threats and FUD marketing. According to Western, it is
26 this entire scheme that damages competition. Accordingly, Riso's

27 ⁹
28 Western's allegation that it sells an undisclosed
amount of ink and masters does not defeat its claims.

1 notion to dismiss Western's claims on the ground that Western
 2 cannot establish that it has been harmed by any of Riso's dealer
 3 restraints is denied.

4 C. Warranties

5 To the extent that Western contends that Riso unlawfully
 6 ties its warranty to the use of Riso parts, supplies and Riso-
 7 authorized service, Riso moves to dismiss on the ground that
 8 there is no tie.

9 Tying arrangements exist where the buyer is coerced into
 10 buying the tied product, or at least agrees that he will not
 11 purchase that product from any other supplier. Northern Pacific
 12 iv. co. v. United States, 356 U.S. 1, 5-6 (1958).

13 [T]he essential characteristic of an invalid tying
 14 arrangement lies in the seller's exploitation of its
 15 control over the tying product to force the buyer into
 16 the purchase of a tied product that the buyer either
 17 did not want at all, or might have preferred to
 purchase elsewhere on different terms. When such
 "forcing" is present, competition on the merits in the
 market for the tied item is restrained and the Sherman
 Act is violated.

18 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12
 19 (1984).

20 Western alleges, among other things, that the maintenance
 21 agreements used by Riso's branch offices provide that customer's
 22 will incur additional charges for "service made necessary by the
 23 use of materials other than those approved by Riso, Inc. for use
 24 in the Equipment." SAC ¶ 82. Western also alleges that
 25 employees of Riso's branch offices have "falsely represented that
 26 use of [Western] supplies caused damage to Risographs and
 27 necessitated repairs and threatened to bill customers for any
 28 repairs if they continued to use [Western] supplies." Id. ¶ 83.

1 According to Western, such representations cause the Riso
2 maintenance agreements to operate as *de facto* tying arrangements.
3 Id. A reasonable jury could conclude that the maintenance
4 agreement coupled with the alleged disparagement and threats
5 "forced" customers to purchase only Riso supplies. Accordingly,
6 Riso's motion to dismiss plaintiff's tying claims insofar as they
7 involve Riso's warranty is denied.

8 **3. Lanham Act**

9 Western claims that Riso violated the Lanham Act by making
10 "false or misleading representations of the nature,
11 characteristics, or qualities of plaintiffs' [sic] services and
12 products." Id. ¶ 137. Western identifies three allegedly false
13 or misleading statements in its second amended complaint. First,
14 Western contends that Riso distributes a "WARNING" to its dealers
15 for distribution to Risograph owners which states that use of
16 generic supplies may (1) damage the "Riso Drum," (2) contaminate
17 the "Ink Drum Unit" or adjacent areas which house electronic
18 circuitry, (3) cause premature failure of the "Thermal Head" and
19 related components, (4) cause premature failure of the "Inking
20 System," (5) create a toxic environment, (6) result in fire, (7)
21 result in termination of the 7 year/10 million copy warranty, (8)
22 increase service contract pricing, (9) result in termination of
23 any full coverage maintenance agreement, (10) result in "High
24 User Hourly Service Rates," and (11) result in a "Complete Ink
25 Drum Cleanout Charge." Id. ¶ 87. Second, Western contends that
26 Riso distributes warning stickers to its dealers for placement
inside Risographs that warn that use of non-Riso ink may result
28 fire. Id. ¶ 88. Finally, Western alleges that Riso recently

1 distributed a warning sticker which reads:

2 WARNING

3 Be sure your masters and ink cartridges carry the
4 original RISO logo. Use of non-RISO manufactured inks
5 or masters may result in lower print quality, higher
6 cost per copy, significant increase in set off and may
7 cause serious damage to the ink cylinder and the
8 Risograph.

9 Use of non-RISO manufactured inks or masters may cause
10 repair or service problems not covered by your warranty
11 or service agreement. Please consult your authorized
12 RISO representative for further information.

13 Id. ¶ 89. Western alleges that the above claims are false and/or
14 misleading, id. ¶¶ 86-87, 137 and that it has lost sales as a
15 result, id. ¶¶ 90, 138.

16 In order to state a claim under § 43(a) of the Lanham Act,
17 15 U.S.C. § 1125(a), a plaintiff must allege: "(1) a false
18 statement of fact by the defendant in a commercial advertisement
19 about its own or another's product; (2) the statement actually
20 deceived or has the tendency to deceive a substantial segment of
21 its audience; (3) the deception is material, in that it is likely
22 to influence the purchasing decision; (4) the defendant caused
23 its false statement to enter interstate commerce; and (5) the
24 plaintiff has been or is likely to be injured as a result of the
25 false statement, either by direct diversion of sales from itself
26 to defendant or by a lessening of the goodwill associated with
27 its products." Southland Sod Farms v. Sover Seed Co., 108 F.3d
28 1134, 1139 (9th Cir. 1997).

29 Riso moves to dismiss Western's Lanham Act claim on the
30 grounds that the statements relied on by Western are not specific
31 enough and are true. Riso contends that the alleged
32 misrepresentations lack specificity because (1) they do not claim

1 that use of non-Riso products will always lead to poor results or
2 cause damage, and (2) do not refer to any supplier, including
3 Western, by name. Rather, according to Riso, they merely "state
4 that certain unnamed non-Riso supplies may present difficulties
5 for the Risograph user and/or damage the machine."

6 The Lanham Act does not reach claims of general superiority.
7 See Cook, Perkiss and Liehe, Inc. v. Northern Cal. Collection
8 Serv. Inc., 911 F.2d 242, 246 (9th Cir. 1990). Where an
9 advertisement quantifies the superiority, however, a claim may
10 lie. Id. The issue in Cook was whether an advertisement which
11 implied that a collection agency offers the same collection
12 services as lawyers at lower or more competitive prices was mere
13 puffery, and thus, not actionable under the Lanham Act. Id. at
14 245. Although the court held that the advertisement was "merely
15 general in nature," and therefore nonactionable puffery, the
16 court noted that "misdescriptions of specific or absolute
17 characteristics of a product are actionable." Id. (quoting
18 Stiffel Co. v. Westwood Licrhtina Group, 658 F. Supp. 1103, 1115
19 (D. N.J. 1987)). "[A]dvertising statements placed in an ad
20 knowing or intending that they are of the type that will affect
21 the consumer's judgment, are not puffery, but rather constitute
22 actionable representations within the meaning of the Lanham Act."
23 U-Haul Int'l, Inc. v. Jartran, 522 F. Supp. 1238, 1253 (D. Ariz.
24 1981), aff'd, 681 F.2d 1159 (1982).

25 The alleged misrepresenations at issue here far exceed
26 general statements of superiority. To the contrary, the various
27 warnings allegedly produced by Riso warn of specific consequences
28 which may result from using non-Riso products, including fire,

1 severe equipment damage, exposure to toxic substances, and
2 termination of the 7 year/10 million copy warranty.

3 The court rejects Riso's assertion that its use of the term
4 "may" alone shields it from liability as a matter of law. In
5 Gillette Co. v. Norelco Consumer Prods. Co., 946 F. Supp. 115,
6 137 (D. Mass. 1996), relied on by Riso, the court held that the
7 defendant's representation that any product that provided a shave
8 closer than its own "Could be Too Close For Comfort," was not
9 actionable because it was not objectively capable of proof or
10 disproof. Id. at 137. The court observed that the plaintiff's
11 failure to offer any standards by which to measure the truth of
12 the statement was understandable, "because the conditional
13 'could' is denotative of only a possibility; and things that are
14 possible can occur, but they may not." Id. Riso argues that,
15 Like the plaintiff in Gillette, Western complains of statements
16 that suggest a possibility. Riso is correct, none of the
17 warnings state that use of non-Riso products will cause an
18 untoward result. However, unlike the vague possibility suggested
19 in Gillette that a shave could be "too close," Riso warns of no
20 less than 11 specific occurrences of damages which may result
21 from use of non-Riso products, including fire, severe equipment
22 damage, exposure to toxic substances, and termination of the 7
23 year/10 million copy warranty. This is not the type of vague
24 puffery at issue in Gillette and the other cases relied on by
25 Riso.

26 Likewise, a plaintiff need not be specifically named in the
27 allegedly disparaging statement where the group named is small
28 enough that the statement can reasonably be understood to apply

1 **Intentional Interference With Contractual Relations And A**
 2 **Prospective Economic Advantage**

3 In order to state a claim for intentional interference with
 4 contractual relations or prospective economic advantage, Western
 5 must allege, among other things, a valid contract or economic
 6 relationship between itself and a third party, and Riso's
 7 knowledge of the same. See Pacific Gas & Electric Co. v. Bear
 8 Stearns & Co., 50 Cal. 3d 1118, 1126 (1990); Westside Ctr.
 9 Assocs. v. Safeway Stores 23, Inc., 42 Cal. App. 4th 507, 521-522
 10 (1996). Riso moves to dismiss Western's intentional interference
 11 claims on the **ground** that Western failed to allege that Riso was
 12 aware of any relationship or contract between Western and a third
 13 party.


14 In its second amended complaint, Western alleges that: (1)
 15 it has been successful in obtaining some orders for ink and
 16 masters from school districts in the Bay Area; (2) upon learning
 17 of Western's success, two Riso dealers, including defendant RPSI,
 18 "engaged in threats and product disparagement toward those school
 19 districts;" (3) at the time the dealers did so, they knew that
 20 Western was the source of those districts' ink and masters and
 21 intended their threats and false statements be understood to
 22 refer to Western's products; and (4) the threats and
 23 disparagement undertaken the dealers were carried out in
 24 conspiracy with and with the assistance of Riso, specifically in
 25 connection with the contracts between Western and Stockton
 26 Unified School District and the Modesto City Schools. SAC ¶¶
 27 152-55. Western's allegation that Riso "specifically aid[ed] and
 28 assist[ed] [RPSI] in its interference with the contract between

1 4. The parties' respective evidentiary motions are DENIED
2 WITHOUT PREJUDICE.

3 5. No points and authorities submitted in this action
4 shall exceed 40 pages. No accompanying pleadings, including
5 declarations, statements of fact and responses thereto, shall
6 exceed 20 pages.

7 IT IS SO ORDERED.

8 DATED: November 20, 2000.


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11 FRANK C. DAMRELL, Jr.
12 UNITED STATES DISTRICT JUDGE
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United States District Court
for the
Eastern District of California
November 21, 2000

as

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* * CERTIFICATE OF SERVICE * *

2:98-cv-00208

Western Duplicating

v.

RISO

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on November 21, 2000, I SERVED a true and correct **copy(ies)** of the attached, by placing said **copy(ies)** in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said **copy(ies)** into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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BY: Deputy Clerk